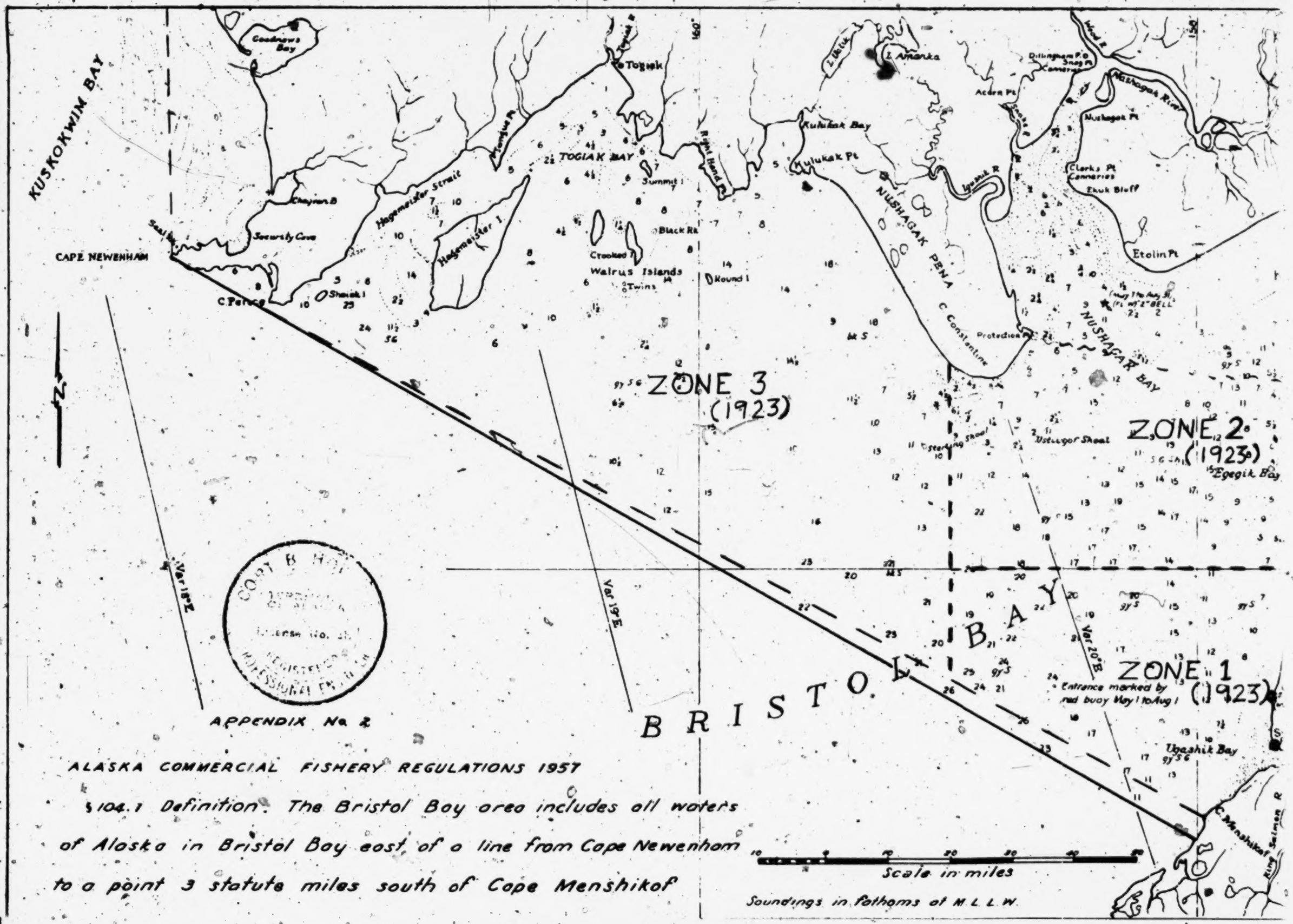
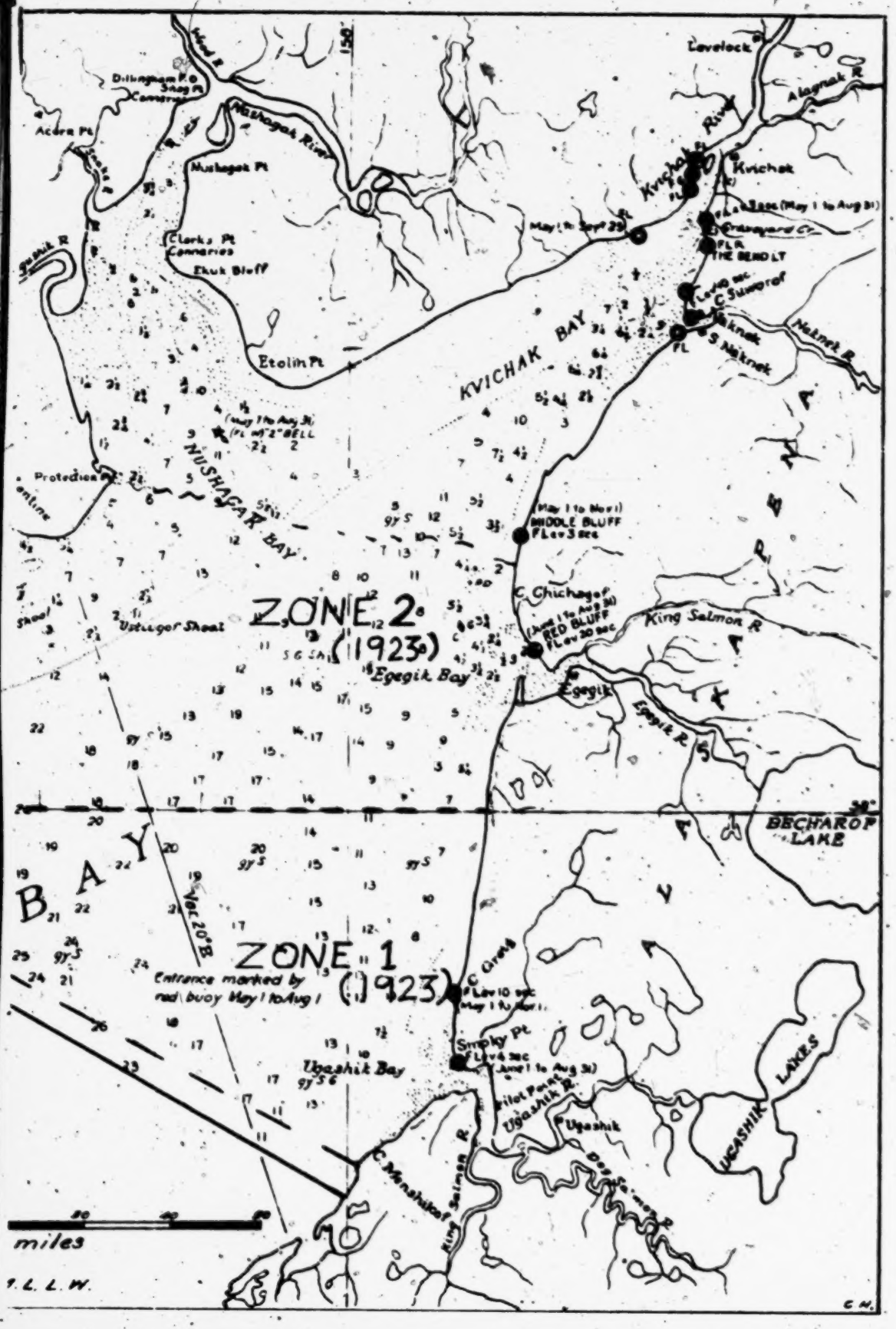


APPENDIX No 2

ALASKA COMMERCIAL FISHERY REGULATIONS 1957

§104.1 Definition. The Bristol Bay area includes all waters of Alaska in Bristol Bay east of a line from Cape Newenham to a point 3 statute miles south of Cape Menshikof


Dillingham P O
Shag Pt
Cannery
Acora Pt
Nushagak River
Nushagak Pt
Clarks Pt
Cannaries
Ekuk Bluff
Etolin Pt
Protection Pt
entine
NUSHAGAK BAY
Shoal
Ustiugof Shoal
ZONE 2
(1923)
Egegik Bay
B A Y
Var 20° E
ZONE 1
(1923)
Entrance marked by
red buoy May 1 to Aug 1
Ugashik Bay
C Menshikof
Ugashik R
Pilot Point
Ugashik
Ugashik Lakes
Dog Salmon R
Egegik R
Egegik
King Salmon R
C Chichagof
(June 1 to Aug 31)
RED BLUFF
FL ev 20 sec
(May 1 to Nov 1)
MIDDLE BLUFF
FL ev 3 sec
KVICHAK BAY
S Naknek
Naknek R
Naknek
FL
Kvichak River
Kvichak
Lovelock
Alagnak R
Graveyard Cr
FLR
THE BEND LT
C Sumnerof
Becharof Lake
C Greek
Simpky Pt
FL ev 4 sec
(June 1 to Aug 31)
FL ev 10 sec
(May 1 to Nov 1)
miles
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JAMES R. BROWNING, Clerk

BRIEF ON MERITS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 106

STATE OF ALASKA, *Petitioner*,

v.

ARCTIC MAID and ARCTIC MAID FISHERIES, INC., *Respondent*.

STATE OF ALASKA, *Petitioner*,

v.

PACIFIC REEFER and PACIFIC REEFER FISHERIES, *Respondent*.

STATE OF ALASKA, *Petitioner*,

v.

PACIFIC QUEEN and PACIFIC QUEEN FISHERIES, *Respondent*.

STATE OF ALASKA, *Petitioner*,

v.

ALASKA REEFER and ALASKA REEFER FISHERIES, *Respondent*.

STATE OF ALASKA, *Petitioner*,

v.

NORTH STAR and NORTH STAR FISHERIES, *Respondent*.

STATE OF ALASKA, *Petitioner*,

v.

NORTHERN REEFER COMPANY, GRIMES PACKING COMPANY and REEFER II, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER

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MISCELLANEOUS:

Paul J. Hartman, State Taxation of Interstate Commerce (1953 ed.) at p. 113 11

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the District Court for the Territory of Alaska, Division Number One, at Juneau, entered March 17, 1956, is reported at 140 F. Supp. 190 (R.

60) and a supplemental opinion of that Court entered May 25, 1956, is set forth at page 82 of the Record. The opinion of the United States Court of Appeals for the Ninth Circuit, dated March 16, 1959, is unreported and attached to this Brief as Exhibit "A". The opinion of the Ninth Circuit Court of Appeals, dated March 23, 1960, superseding the earlier decision of March 16, 1959, is found at 277 F. 2d 120 (R. 380).

JURISDICTION

The judgment of the District Court for petitioner was entered by the District Court on May 25, 1956 (R. 87). These cases were then appealed by respondents to the United States Court of Appeals for the Ninth Circuit under Title 28, United States Code, Sections 1291 and 1294(2) and were heard by a division of that Court. On March 16, 1959, the Ninth Circuit Court of Appeals entered an opinion and judgment vacating the judgment of the District Court and remanding the causes for a redetermination of the amount of the taxes owing by the respondents and for reexamination of the status of a tax lien in one of the cases. On respondents' motion a rehearing was granted by the Court on November 9, 1959. On March 23, 1960, after the causes were heard and submitted to the Court en banc an opinion and judgment were entered reversing the District Court and remanding the causes with instructions to enter judgment for appellants (respondents here) on the tax claims and to adjudicate the counterclaims (for taxes paid under the tax statute held to be invalid).

The jurisdiction of the Supreme Court to review this judgment is invoked under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

1. Whether a tax on the freezer ship line of business carried on in connection with Alaska's commercial fishers is (a) a tax on the taking of fish (as the trial court held), (b) a tax on the entire operation of freezer ships to the extent that such activity occurs within Alaska's taxing jurisdiction (as the Ninth Circuit Court of Appeals first held), or (c) a tax on the "processing of fish by freezing only" (as the Ninth Circuit Court of Appeals held on rehearing)?

2. Whether freezer ships, which lie off the three-mile limit of Alaska (or within Alaskan waters if Bristol Bay is included in State waters), which send their catcher boats within Alaskan waters to catch salmon, which freeze the salmon caught within Alaskan waters and also fish purchased from independent Alaska fishermen, and which transport such fish to Seattle, Washington, are engaged in interstate commerce and are for that reason exempt from the Alaska annual license tax?

3. Whether the fact that an integral part of the operation of a freezer ship in Alaska is the catching of salmon within Alaska waters and preserving the fish so obtained is sufficient to characterize the business of a freezer ship as local in nature and, therefore, not a part of interstate commerce?

STATUTES INVOLVED

The statute involved is Ch. 116, SLA 1951, and in particular, Section 1(b) of that statute. The statute provides:

AN ACT

"Amending Section 1 of Chapter 97, Session Laws of Alaska, 1949 imposing a license tax on

freezer ships and other floating cold storages; and declaring an emergency.

"Be it enacted by the Legislature of the Territory of Alaska:

"Section 1. Section 1 of Chapter 97, Session Laws of Alaska, 1949, is hereby amended to read as follows:

"Section 1. BUSINESS IN ALASKA FISHERIES REQUIRING LICENSES: AMOUNTS THEREOF. *Any person, firm or corporation prosecuting or attempting to prosecute any of the following lines of business in connection with Alaska's commercial fisheries shall first apply for and obtain on the conditions hereinafter set forth, a license so to do on the basis of the following license taxes which are hereby levied:*

"(a) Shore based cold storages and all other fish processors, except salmon canneries, herring processing plants, crab canneries and clam canneries otherwise licensed: An annual license tax equal to 1% of the value of the raw halibut, halibut livers and viscera, salmon and bottom fish, shellfish or other fishing resource bought or otherwise obtained for processing through freezing, salting or other method. The value of the raw material under this license shall be the actual price paid for same including indirect considerations such as fuel or supplies furnished by the processor or offsets to the cash value for gear furnished etc. Such value shall apply to the raw material herein mentioned which is procured in company owned or subsidized boats operated by employees of the processor or under lease or other arrangement.

(b) *Freezer ships and other floating cold storages: An annual license tax equal to 4% of the value of the raw halibut, halibut livers and viscera, salmon and bottom fish, shellfish or other fishing resource bought or otherwise obtained for process-*

ing through freezing. The value of the raw material under this license shall be the actual price paid for same including indirect considerations such as fuel or supplies furnished by the processor or offsets to the cash value for gear furnished etc. Such value shall apply to the raw material herein mentioned which is procured in company owned or subsidized boats operated by employees of the processor or under lease or other arrangement.

"Section 2. An emergency is hereby declared to exist and this Act shall take effect immediately upon its passage and approval.

"Approved March 24, 1951." (Italics added.)

In order to present to the Court a picture of the Alaska program for taxing fish processors applicable portions of the following statutes will be referred to and are printed in the Appendix as follows: Sec. 1, Ch. 82, SLA 1949—Exhibit "B"; Sec. 1, Ch. 97, SLA 1949—Exhibit "C"; Ch. 113, SLA 1951—Exhibit "D."

STATEMENT

Approximately ten years ago respondents began to use freezer ships for the taking and preservation of salmon along Alaska shores. These ships are equipped with catcher boats which are used to catch the salmon within three miles of the low tide mark along the Alaska coastline. Freezer ships also occasionally purchase salmon from independent fishermen.

The greatest concentration of the operations of the freezer ships occurs in Bristol Bay. Bristol Bay is a large but very shallow bay, formed to a large extent by the estuaries of the Nushagak, Kvichak and Egegik Rivers. For the Court's convenience, a map of Bristol Bay is attached as Exhibit "E." Bristol Bay is the greatest fishing ground in the world for red (sockeye)

salmon. When operating in Bristol Bay, the freezer ships anchor outside the three-mile limit where they serve as a base for their catcher boats. When operating near Kodiak Island and in Southeastern Alaska they anchor closer to shore and obtain fish from catcher boats while so positioned.

When a catcher boat has made its catch, it returns to the freezer ship and unloads. The fish are immediately frozen in brine and stored. This procedure is followed until the end of the season when the catcher boats are loaded on the freezer ships and the freezer ships return to Puget Sound where the salmon are unloaded and canned (R. 37-42).

The Territory of Alaska has undertaken a policy of taxing all fish processors engaged in business "in connection with Alaska's fisheries." The first example of such legislation was a 1949 act taxing the business of salmon canneries by a tax measured by the value of salmon purchased or otherwise obtained for processing. The measure of the tax was set at 4 per cent of the value of the salmon so obtained. Other businesses "in connection with Alaska's fisheries" were similarly taxed under this act as follows: salmon cold storages freezing fish for the fresh fish market at 1 per cent; herring processing plants at 1 per cent; crab canneries at 1 per cent; clam canneries (not including butter clam canneries) at 2 per cent; and butter clam canneries at 1 per cent. See Ch. 82, SLA 1949, which is attached to this brief as Exhibit "B."

Later in the same session, the Legislature filled some loopholes in Ch. 82 by making those cold storages and fish processors omitted from the coverage of Ch. 82 subject to a tax measured by 1 per cent of the values of fisheries products purchased or otherwise obtained

for processing. See Ch. 97, SLA 1949, which is attached to this brief as Exhibit "C."

In 1951 the Legislature raised the tax on salmon canneries to 6 per cent. See Ch. 113, SLA 1951, attached as an Exhibit "D." In the same year Ch. 97, SLA 1949 was amended by Ch. 116, SLA 1951 to bring freezer ships and floating cold storages doing business "in connection with Alaska's fisheries" within the scope of the Alaska tax program for taxing fish processors. The prosecution of the freezer ship line of business in Alaska was made a taxable incident and the measure of the tax was set at 4 per cent of the value of fisheries products purchased or otherwise obtained for processing through freezing.

In 1955 the Territory brought suit against six freezer ship operators to collect $116,731.53 claimed to be owing under the provisions of Ch. 116, SLA 1951 for taxes, penalties, and interest for the years 1951-1955.

The freezer ship operators attacked Ch. 116, SLA 1951 on several grounds, alleging: (1) repugnance of the statute to the United States Constitution and Federal statutes; (2) inapplicability of the tax because of the territorial limits of Alaska's taxing jurisdiction, to fish on board the freezer ship when the ship is more than three miles from the shore even though the fish have been caught within the three-mile distance; and (3) inapplicability of the tax to the respondents since the tax applies only to fish obtained for freezing: freezer ships, it was argued, obtain their fish for canning.

On March 17, 1956, the trial Court upheld the tax, finding that the taxable event was the taxing of the fish

and also that the tax applied to all fish obtained by the freezer ships. See *Territory of Alaska* v. *The Arctic Maid*, 140 F. Supp. 190 (Alaska 1956) (R. 60, 82).

The freezer ship operators then prosecuted an appeal to the United States Court of Appeals for the Ninth Circuit where the case was argued before a division of that Court. On March 16, 1959, the Court held that the incidence of the tax is the operation of the ships, that the tax can only apply to those operations of freezer ships which occur within Alaska's taxing jurisdiction, and that freezer ships are subject to taxation measured by the value of the fish obtained by their catcher boats since the catcher boats catch their salmon within Alaska waters. The Court ruled that the freezer ships were not required to pay Alaska taxes on fish obtained within Alaskan waters by independent catcher boats and purchased by the freezer ships outside Territorial waters. The Court also ruled that part but not all of Bristol Bay is within the taxing jurisdiction of the then Territory of Alaska. See Appendix "A" of this Brief for a copy of that opinion.

The Ninth Circuit Court of Appeals granted a rehearing on November 8, 1959 and the case was argued before the Court en banc. On March 23, 1960 the Court filed its opinion, holding that the taxable event was the freezing of the fish. Applying the "loading and unloading" test of *Joseph* v. *Carter & Weekes Co.*, 330 U.S. 422, 433 (1947) and *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U.S. 69, 83 (1946), the Court held that the freezing and cold storage activity of freezer ships takes place after the flow of interstate commerce has begun. The Court further held that the activity of freezing and cold storing fish, engaged in by freezer ships while lying at anchor in Territorial

waters preparatory to transporting such fish to the State of Washington for canning, is an integral part of interstate commerce, and that any territorial privilege tax levied on such activity is forbidden by the Commerce Clause (R. 391).

SUMMARY OF ARGUMENT

The Court of Appeals confused the incidence or subject of the tax and the measure of the tax. The taxable incident is the prosecution of any part of a freezer ship line "of business in connection with Alaska fisheries" that occurs within Alaskan waters. The Court of Appeals stressed certain language used in prescribing the measure of the tax, "processing through freezing," and concluded that this put the emphasis on only one aspect of freezer ship operation in Alaska, that being the freezing of the fish. Petitioner submits that if any emphasis is to be placed on language used in describing the measure of the tax it should be placed on "bought or otherwise obtained," i.e., the taking of the fish.

Under the second opinion of the Court of Appeals freezer ships cannot be taxed by the State of Alaska on the ground that their activities are inseparable from interstate commerce. However, the line of cases followed by the Court are not relevant to operations carried on by freezer ships in Alaska. There is a clear line of cases, discussed in our Argument II of this brief regarding the taxation of businesses which extract resources for later shipment in interstate commerce that is more apposite than cases regarding the transportation of goods and services in interstate commerce.

The exemption of one part of the fishing industry in Alaska from taxation would have a discriminatory

effect on every remaining sector of the industry. Any attempt to avoid this discriminatory effect would require a drastic change in the taxation of Alaska fishing operations. It would require shifting the burden of taxation from the processor to the fisherman. In Alaska this means shifting the burden from those who can afford to pay to those who cannot.

ARGUMENT

I

THE INCIDENCE OF THE TAX IS ON THE CARRYING ON OF ANY PART OF A FREEZER SHIP BUSINESS THAT OCCURS WITHIN ALASKAN WATERS AND IS NOT ON THE "FREEZING OF FISH"

The Alaska Legislature placed the incidence of the tax on the carrying on of any part of the freezer ship line of business occurring within Alaskan waters and did not place it on the "freezing of fish."

The United States Court of Appeals for the Ninth Circuit confused the *incidence* of the tax (the "prosecuting" of the line of business of "freezer ships and other floating cold storages") with the *measure* of the tax (the "value" of the "fishing resource bought or otherwise obtained"). There is no justification for looking further into the tax statute to determine whether or not the measure of the tax narrows or broadens the taxing event. The measure is four per cent of the value of raw fish "bought or otherwise obtained for processing through freezing."

The words "through freezing" are surplusage. A freezer ship is engaged in the business of freezer ship only when and to the extent that it freezes the fish it obtains. Only activities involved in the freezing and storage of fish are taxed under Sec. 1(b) of Ch. 97, SLA 1949, as amended. If the processor in Alaska obtains

and uses the fish for another purpose, it would be engaged in another line of business and would be subject to a different Alaska processor tax. For example, if the ship obtained the fish for canning it would be taxed as a floating cannery at six per cent of the value of the fish obtained for canning.

The Court of Appeals attributed great significance to the words "processing through freezing" and concluded that this put the emphasis of the taxing statute on only one of many phases of a freezer ship operation in Alaska. Under this construction, the incidence of the Alaska business license tax is not on the whole business of the taxpayer occurring within Alaska, but is only upon one narrow aspect of it. This is an exceedingly unusual construction of a business license tax. Petitioner respectfully suggests that if the measure of the tax be referred to in order to define the incidence of the tax, a more proper area for emphasis would be the words "bought or otherwise obtained," that is, the taking of this fish. This was what the trial Court did in locating the taxable incident.

As a general rule, if a tax is laid upon a subject within the taxing power of the state, it will not be condemned because of the measure as such. In *Home Insurance Co.* v. *New York*, 134 U.S. 594, 600 (1890), the Court stated that the "validity of the tax can in no way be dependent upon the mode which the State may deem fit to adopt in fixing the amount." Therefore, it has been stated that the measure of the tax does not present a constitutional question. See Hartman, *State Taxation of Interstate Commerce* (1953 Ed.) at page 113.

However, this Court has gone behind the statute in some cases and determined when it would treat the

legislatively prescribed measure as the incident or subject of the tax. Thus in *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434 (1939), the Court struck down a tax for the reason "that the tax, though nominally imposed upon appellant's activities in Washington, by the very method of its measurement reaches the entire interstate commerce service rendered both within and without the state and burdens the commerce in direct proportion to its volume." In that case the Court used the measure as a factor in deciding what is really the subject or incidence of the tax.

Petitioner hopes in this Argument and in the succeeding Arguments to indicate conclusively to the Court the intrastate nature of the tax. Petitioner believes that the Ninth Circuit Court of Appeals was correct the first time it heard the case. In its first decision, since withdrawn, it was held that the taxable event was that portion of a freezer ship's operations which occurs in Alaska's taxing jurisdiction. Catcher boats are an extension of the freezer ship and the catching of fish by catcher boats within Alaska's taxing jurisdiction is sufficient to bring that part of the freezer ship operation under the Alaska freezer-ship tax.

The construction placed upon the freezer-ship tax statute by the Ninth Circuit Court of Appeals is objectionable because it may have the effect of placing the bulk of the otherwise taxable freezer ship activities outside of the geographic limits of Alaska's taxing jurisdiction.[1] If the freezing of the fish is the taxable

[1] If the Ninth Circuit Court of Appeals in its first decision of March 16, 1959 is correct a good part of the freezing activities of the freezer ships takes place outside of the taxing jurisdiction of Alaska. That Court declared most of Bristol Bay to be outside of Alaska's taxing jurisdiction. Under that decision the only part

incident and if the bulk of the fish are frozen outside of Alaska's taxing jurisdiction, only a small amount of taxes could be collected through this tax.

The construction placed on the Alaska tax by the Ninth Circuit Court of Appeals is also objectionable because it suggests that a tax on the freezing of the fish is a tax on an act which is preparatory to the later shipment of the fish to a point outside of Alaska. It suggests that the freezing and the shipment of the fish are somehow inseparably tied together—the theory being that if the shipment of the fish is interstate

---

of much of the freezer ships operations the Alaska tax could reach would be the fishing operations of the freezer ships carried on by their catcher boats. Under that decision the freezing would in many, and perhaps most cases, occur outside of Alaska's taxing jurisdiction.

Alaska strongly maintains, however, that the portion of Bristol Bay east of a line drawn from Cape Newenham to a point 3 miles south of Cape Menshikof is within Alaska's jurisdiction for both taxation and conservation purposes. In support of this the State of Alaska points to a 36-year history of exclusive control over Bristol Bay by the Federal government for conservation purposes under fish and wildlife regulations promulgated under the Act of June 26, 1906, c. 3547, 34 Stat. 478, 48 U.S.C. §§ 230, 231, 235-239, 241, 242 (beginning with Department of Commerce Circular No. 251, 9th Ed. dated Jan. 9, 1923 and ending with 24 FR 3265-3268), the long standing policy of excluding aliens from such waters under the Act of June 14, 1906, c. 3299, 34 Stat. 263, 48 U.S.C. §§ 244-247, and the policy of establishing closed seasons and similar conservation controls in only the waters "over which the United States has jurisdiction" as provided in the Act of June 6, 1924, 43 Stat. 464, c. 272, 48 U.S.C., §§ 225-228, relating to the "protection of fisheries in Alaska and for other purposes." Bristol Bay constitutes waters over which the United States has asserted such jurisdiction and for which closed seasons have been prescribed. Alaska succeeded to most of the Federal government's responsibility for conservation of fish and wildlife resources in Alaska (including Bristol Bay), under Sec. 6(e) of the Act of July 7, 1958, 72 Stat. 339 (the Alaska Statehood Act).

commerce then the freezing must also be interstate commerce. By emphasizing the freezing of the fish alone the connection between the freezing and the later shipment may be emphasized. This may lead to the severance operations of freezer ships being underemphasized or ignored.

If the taking of the fish and their immediate refrigeration after being taken is considered as a whole the emphasis tends to fall on the clearly intrastate operations of the freezer ship.

It should make no difference as far as the constitutionality of the tax is concerned whether the taxable incident is the freezing of the fish or the taking and the freezing taken together.[2] In either event the freezing is more closely tied in with the taking of the fish than with the later transportation of the fish.

II

FREEZER SHIPS, IN TAKING AND PROCESSING FISH BY FREEZING, ARE NOT ENGAGED IN INTERSTATE COMMERCE, BUT ARE INSTEAD ENGAGED IN BUSINESS OF A LOCAL NATURE

Freezer ships, in taking and processing fish by freezing, are not engaged in interstate commerce, but are instead engaged in business of a local nature.

The Ninth Circuit Court of Appeals has held that freezer ships cannot be taxed under Ch. 97 because their activities are inseparable from interstate commerce. Yet the Court used a line of cases in characterizing the

[2] It is important to understand the close relationship between the taking and the freezing. Salmon are highly perishable and cannot be kept in a fresh condition for more than a few days (R. 251). Without the immediate freezing of the salmon, the value of the catch would be nil, unless other methods of local preservation were utilized.

problem which is entirely and classically interstate in nature.

The first main case relied upon by the Ninth Circuit Court of Appeals is a natural gas transmission line case, *Mich.-Wis. Pipe Line Co.* v. *Calvert*, 347 U.S. 157 (1954). In that case Texas put a tax on the occupation of "gathering gas," measured by the entire volume of gas "taken." A natural gas pipeline company sought recovery of money paid under protest in compliance with the statute. The pipeline company was engaged in an enterprise solely devoted to the transportation of gas and held a certificate of convenience and necessity for that transportation in interstate commerce. The company produced no gas and the gas flowed into its pipes in a finished state with no further refining necessary before interstate transportation began. In fact, the gas was only transported in Texas for 1.74 miles before it was in Oklahoma. The facts resemble very closely those in the case of *Richfield Oil Corp.* v. *State Board*, 329 U.S. 69 (1946), also cited by the Court of Appeals and discussed *infra*, where delivery was made to a ship ready to sail for New Zealand. The facts, however, do not resemble cases involving the extraction of a natural resource or a mineral previous to its refinement or processing preparatory to introduction of the article or product in interstate passage.

In the *Michigan-Wisconsin* case the Court emphasized the "steady and continuous flow" of the oil in the pipeline from producing wells clear through to consumers outside Texas. See 347 U.S. at 163. Another consideration that should be remembered in comparing *Michigan-Wisconsin* to this case is the fact that the Michigan-Wisconsin Pipe Line Co. paid con-

siderable taxes of various sorts to the State of Texas. Respondents pay no other taxes to Alaska.

We wish to emphasize the aspects bearing upon the *Michigan-Wisconsin* decision having relevance to this case. At 347 U.S. 166, Mr. Justice Clark, speaking for a unanimous Court, stated:

> "It is now well settled that a tax imposed on a local activity related to interstate commerce is valid if, and only if, the local activity is not such an integral part of the interstate process, the flow of commerce, that it cannot realistically be separated from it. [Cases] And if a genuine separation of the taxed local activity from the interstate process is impossible, it is more likely that other states through which the commerce passes or into which it flows can with equal right impose a similar levy on the goods, with the net effect of prejudicing or unduly burdening commerce." (Brackets added.)

Here the taxing incident is separable from the flow of commerce. It was stated in Argument I of this Brief that there is a significant difference between the taxing *incident* and its *measure*, with significant results for this case. The taxing incident which occurs in Alaska by its very nature is such an incident that it *cannot* occur in any other jurisdiction, regardless of the number of states that the fish pass through.

In the *Michigan-Wisconsin* case the Court was concerned whether Texas had "delayed the incidence of the tax beyond the step where production and processing have ceased and transmission in interstate commerce has begun." See 347 U.S. at 167. The "transmission" in our factual situation is delayed for an entire fishing season, ordinarily for about six weeks.

(R. 45). Catcher boats more or less regularly deliver the catch and it is frozen. This process starts at the opening of the red (sockeye) salmon season and continues to its conclusion. The frozen fish await the end of the season before they are transported to the Puget Sound canneries.

The next case the Court of Appeals relied on in its opinion is the case of *Joseph V. Carter & Weekes Co.*, 330 U.S. 422, 433 (1947). That case involved an essential part of interstate commerce, i.e., the loading and unloading of vessels moving in interstate and foreign commerce. Speaking for the Court, Mr. Justice Reed stated at 427-428:

> "We do not think that a tax on gross income from stevedoring, obviously a 'continuation of the transportation,' is a tax apportioned to income derived from activities within the taxing state. The transportation in commerce, at the least, begins with loading and ends with unloading. *Loading and unloading has effect on transportation outside the taxing state because those activities are* not only preliminary to but are *an essential part* of the safety and convenience *of the transportation itself.*" (Italics added.)

The Court considered the inhibitions to interstate commerce from "unneighborly regulations" to be a significant factor in striking down the excise tax. At page 429 of the Court's opinion, Mr. Justice Reed stated the factor which distinguishes the freezer ship case from the *Joseph* case:

> "The selection of an intrastate incident as the taxable event actually carries a similar threat to the commerce but, where the taxable event is considered sufficiently disjoined from the commerce, it is thought to be a permissible state levy. *This*

result generally is reached because the local incident selected is one that is essentially local and is not repeated in each taxing unit.' (Italics added.)

The payment of the Alaska business license tax on the taking and freezing of fish caught in Alaskan waters is quite clearly an event that *cannot* be repeated in any subsequent taxing unit. The fish can only be taxed once as newly caught fish obtained for freezing. The catching of fish is clearly disjoined from commerce, interstate or otherwise. Temporary preservation, in this case by freezing, does not make the process any more a part of interstate commerce than freezing of peas for later shipment to other states makes that activity a part of interstate commerce.

Another case relied upon by the Ninth Circuit is the case of *Richfield Oil Corp.* v. *State Board,* 329 U.S. 69 (1946). Petitioner respectfully suggests that the Court of Appeals used an inappropriate case for reaching its conclusion, since this Court stated quite clearly at page 75 of its opinion that it does "not pursue the inquiry as to the validity of the tax under the Commerce Clause. For we are of the view that whatever might be the result of that inquiry, the tax is unconstitutional under Article I, Section 10, Clause 2" (The Import-Export Clause).

The facts in the instant case bear little resemblance to the *Richfield Oil* case. There is no basis for use of the Import-Export Clause since all parties involved are American citizens; the destination of the frozen fish is an area in Washington State.

If we attempt to argue by analogy, ignoring the mandate of the Court not to confuse the two clauses, the first facts of that case are still not relevant. The loading of the oil tanker for delivery to New Zealand is

the last step necessary to start the oil in interstate or, as in *Richfield,* foreign commerce. This case is another in the line of authority relating to businesses the major purpose of which is the transportation of goods and services in interstate or foreign commerce. It does not relate to those businesses which are partially or entirely engaged in activities of a purely local nature such as fishing, mining, and the extraction of oil and gas resources.

There is no reason for a freezer ship to operate in Alaska waters if it does not freeze the fish as they are caught. The taking is not feasible if it is not immediately followed by some sort of processing. The processing can be the gutting and curing of the fish, the salting of the fish or the refrigeration of the fish, but some sort of processing must attend the taking of the fish. If any activities of a freezer ship are inseparable the taking of the fish and the immediate preservation of the fish after the taking are. A freezer ship could operate successfully without ever leaving Alaska waters. For example, it could catch and freeze fish for later sale to Japanese freighters or cannery ships in Bristol Bay or to local Alaska canneries. A freezer ship could not, however, lay off of Alaska coasts and take Alaska salmon for approximately six weeks without refrigerating the fish as they are caught. It is important to understand the close relationship between the taking and the freezing. Salmon are highly perishable and cannot be kept in a fresh condition for more than a few days (R. 251). Without the immediate freezing of the salmon, the value of the catch would be nothing, unless other methods of local preservation were utilized. For this reason the later transportation of the fish to Seattle is not deserving of emphasis in determining the nature of a freezer ship

operation. Even if the incidence of the tax is found to be the freezing and the freezing alone, this should not result in the statute being held unconstitutional. The freezing is more properly connected with the taking of the fish than with the later shipment of the fish. This is enough to characterize the freezing as a processing activity of a purely local nature.

Appellant has not discussed the cases cited by the Ninth Circuit Court of Appeals because they are the only cases or are the best cases that can be cited in favor of Respondents' position. These few cases are rather discussed because they are leading cases and are fairly representative of the entire class of authorities which were available to the Ninth Circuit Court of Appeals and to Respondents for purposes of supporting Respondents' theory of the case. We do not believe that any of the hundreds of interstate commerce cases similar to the *Michigan-Wisconsin, Richfield Oil* and *Joseph* cases are any more applicable to the facts presented here than those three cases themselves. They almost all are oil and gas transmission, stevedoring and common carrier cases and they are all inapplicable to severance-preservation operations. By showing that the line of cases cited by the Ninth Circuit Court of Appeals does not apply to the facts here, we expect to bring this case under the only other line of authorities available, that being the line of cases applicable to severance, production, processing, and preservation of resources. We know of no middle ground between these two lines of authority.

The other clear line of authority that the Court discussed but refused to follow is that involving the taxation of businesses which take or extract resources for *later* shipment in interstate commerce. Two of the leading cases from this line of authority are ***Toomer*** v.

Witsell, 334 U.S. 385 (1948) and *Oliver Iron Mining Co.* v. *Lord*, 262 U.S. 172 (1923). The rule in these two cases is that a tax on the extraction of resources does not burden interstate commerce since the taxable event, the severance of the resource, occurs before the resource can be said to have entered the flow of interstate commerce.

The *Oliver Iron Mining Co.* case, *supra*, is particularly in point since this Court sustained a tax upon the mining of ore although substantially all the ore left the state and was put upon cars for that purpose almost immediately after it was produced. It was argued in that case that if the occupation of mining was not actually a part of interstate commerce, it was so closely connected with it that a tax on it would constitute a burden or interference with such commerce. This Court upheld the statute. The analogy between the operation of these mines and the conduct of the freezer ship line of business is so close as to make the *Oliver Iron Mining Co.* the most applicable authority to the facts of this case. The intrastate demand for iron ore was negligible, 262 U.S. 177. N.2; the intrastate market for fish produced by freezer ships is nonexistent (R. 384). "At the openpit mines empty cars are run into the mines and there loaded," 262 U.S. at 178. This compares with the catcher boats going into the shallow waters to catch the fish (R. 383). "When loaded the cars are promptly returned to the railroad yards, where they are put into trains which start the ore on its interstate journey." See 262 U.S. at 178. This is a stronger set of facts vis-a-vis the Commerce Clause than the facts in the instant case. Catcher boats load the freezer ship just as the cars are used to load the trains. However, nothing more remained to be done to the iron ore locally, whereas the salmon *must*

be frozen locally or they will spoil. Then again the freezer ships have been spending between 23 and 65 days north of the Dixon Entrance (the southeastern tip of Alaska) (R. 45), whereas the ore trains presumably left Minnesota soon after being loaded. One quotation from the Court's opinion is particularly significant as applied to a freezer-ship operation:

> "The ore does not enter interstate commerce until after the mining is done, and the tax is imposed only in respect of the mining. No discrimination against interstate commerce is involved" 262 U.S. at 179.

The facts in *Oliver* are clearly similar. We submit that the application of the law to the facts should be equally similar.

The other principle case that the Ninth Circuit discussed but refused to follow is *Toomer* v. *Witsell*, 334 U.S. 385 (1948). South Carolina imposed a tax of ⅛ cent a pound on green shrimp taken within the three-mile zone. It was contended that this tax unduly burdened interstate commerce. 334 U.S. at 394. The Court did not agree.

The Court was not faced with a concrete factual situation and refused to construe the statute as applying to any shrimp taken outside the three-mile line. "On its face the statute has no such effect and appellants call our attention to no South Carolina decision so interpreting it." *Supra* at 394. Clearly Alaska has made no claim on the taxation of fish "taken" outside of Alaska's waters. The Court also states that "the taxable event, the taking of shrimp, occurs before the shrimp can be said to have entered the flow of interstate commerce." 334 U.S. at 394-395. See also the cases cited by this Court for the proposition that the taxable event of a tax on the severance of a resource

occurs before the resource enters the flow of interstate commerce: *Hope Natural Gas Co.* v. *Hall*, 274 U.S. 284 (1927); *La Coste* v. *Dept. of Conservation*, 263 U.S. 545 (1924); *Oliver Iron Co.* v. *Lord* (discussed *supra*), 262 U.S. 172 (1923); *Heisler* v. *Thomas Colliery Co.*, 260 U.S. 245 (1922); *Coe* v. *Errol*, 116 U.S. 517 (1886).

III

ANY ATTEMPT BY ALASKA TO CORRECT THE DISCRIMINATORY EFFECT OF THE EXEMPTION OF FREEZER SHIPS OPERATIONS FROM STATE TAXATION WOULD REQUIRE A DRASTIC CHANGE IN THE SOCIAL, ECONOMIC AND POLITICAL APPROACH TO TAXATION IN ALASKA

A review of the various fish processing taxes on fish processors described herein will reveal that it has been the policy of Alaska to insure that the taking of every fish, clam, crab and other fisheries products taken for commercial purposes in Alaska will result in the paying of tax revenues to Alaska and will contribute in meeting the costs of conserving Alaska's fisheries resources. It is also apparent that Alaska has seen fit to place the tax burden on fish processors and not on the fishermen.

The recent decision of the Ninth Circuit Court of Appeals creates a gaping hole in this tax structure. Now all but one class of fish processors processing fish in Alaska are taxed according to the value of the fish taken or obtained. There is now an exception for freezer ships. The taking or obtaining of fish by freezer ships will not now contribute to Alaska's tax revenues nor to the costs of maintaining Alaska's fisheries resources.

This discrimination is so unfair as to demand some correction. A solution is suggested in the next to last paragraph of the opinion of the Ninth Circuit Court of Appeals:

> "Appellants make no contention that the activity of catching fish in Alaskan waters would not be amenable to a non-discriminatory local privilege tax. Toomer v. Witsell, supra, establishes that such an activity may be taxed. . . ."

However, such a solution could only be adopted by abandoning a social, economic and political approach to taxation in Alaska which has been followed for more than 10 years. Presumably a tax could not be constitutionally devised which is levied only upon fish caught by freezer ships. If a severance tax should be placed on fish caught by freezer ships in lieu of a fish processor tax, it would also be necessary to impose severance taxes on all other fish caught in Alaska waters. There are obvious reasons why the Alaska legislature would be reluctant to shift the tax burden from a relatively few solvent fish processors to a large number of fishermen, many of whom are in a poor position to pay substantial severance taxes and many of whom are not accustomed to keeping tax records, or for that matter, records of any kind.

It is apparent that the recent decision of the Ninth Circuit Court of Appeals will have an unusual impact in Alaska. Not only does the State stand to lose more than $116,731.53 involved for the tax years 1950-1955, but it also stands to lose a similar sum for the years 1955-1960. If the discrimination against other fish processors in Alaska is permitted to continue for subsequent years the State will incur additional yearly losses in revenue, while at the same time, operators of freezer ships will continue to have an unfair competitive advantage over fish processors who are taxed. We do not believe that the Commerce Clause was intended to require such discrimination. As a practical matter the State of Alaska under the holding of the Ninth Cir-

cuit Court of Appeals has little choice in determining whether or not this discrimination shall continue since if the State attempts to remedy this discrimination by shifting its fish taxes from the operations of the processors to the taking of fish by the fishermen it will subject a good portion of the Alaska community to taxes which are not only unpopular among the persons which would then be taxed, but which are generally distasteful for social and economic reasons to the Alaska population at large.

CONCLUSION

The Court should distinguish between businesses whose primary purpose is the shipping of articles in interstate commerce and those businesses whose primary purpose is the severance and processing of a resource.

For this reason petitioner respectfully requests that the decision of the Ninth Circuit Court of Appeals be reversed and the cause remanded to the Ninth Circuit Court of Appeals for the determination of other issues including the extent of Alaska's taxing jurisdiction.

Respectfully submitted,

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Dated this 15th day of
December 1960, at Juneau, Alaska.

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15,283

ARCTIC MAID and ARCTIC MAID FISHERIES, INC., *Appellants*,

v.

TERRITORY OF ALASKA, *Appellee*.

No. 15,284

PACIFIC REEFER and PACIFIC REEFER FISHERIES, *Appellants*,

v.

TERRITORY OF ALASKA, *Appellee*.

No. 15,285

PACIFIC QUEEN and PACIFIC QUEEN FISHERIES, *Appellants*,

v.

TERRITORY OF ALASKA, *Appellee*.

No. 15,286

ALASKA REEFER and ALASKA REEFER FISHERIES, *Appellants*,

v.

TERRITORY OF ALASKA, *Appellee*.

No. 15,287

NORTH STAR and NORTH STAR FISHERIES, *Appellants*,

v.

TERRITORY OF ALASKA, *Appellee*.

No. 15,288

NORTHERN REEFER COMPANY, GRIMES PACKING COMPANY and REEFER II, *Appellants*,

v.

TERRITORY OF ALASKA, *Appellee*.

Mar. 16, 1959

Appeal from the United States District Court for the District of Alaska, First Division

Before: FEE and HAMLEY, Circuit Judges, and SOLOMON, District Judge

SOLOMON, District Judge:

This is an appeal from a judgment requiring appellants to pay to the Territory of Alaska certain taxes imposed as license fees on the freezer ships which they operated in Alaskan waters during the years 1951-1954. These taxes were imposed by Chapter 97, § 1, Session Laws of Alaska, 1949, as amended by Chapter 116, § 1, Session Laws of Alaska, 1951.

Appellants, who are all citizens of the United States, are neither citizens nor residents of Alaska. They operate canneries located on Puget Sound in the State of Washington. In order to obtain fish for their canneries, they send freezer ships equipped with brine-freezing and cold storage facilities to Alaskan waters each year during the salmon fishing season. The fish are caught close to shore with gillnets or seines handled by men in small shallow-draft catcher boats. The appellants operate some of these catcher boats and others are operated by their owners under contract with the appellants. Most of these boats are transported to and from Alaska aboard the freezer ship, which acts

as mother ship for their operations. The freezer ships also obtain fish by purchase from independent fisherman operating their own catcher boats.

The freezer ships stay in deep water, more than three miles from shore in the Bristol Bay area but closer to shore in the Kodiak Island and southeastern Alaska fishing areas. When a catcher boat has its catch, it returns to the freezer ship and unloads. The fish are immediately frozen in brine and stored. At the end of each season the freezer ships return to the canneries on Puget Sound where the fish are thawed and then canned.

The freezer ship tax as provided in Chapter 97, as amended, amounts to 4% of the value of the raw fish bought or otherwise obtained by freezer ships or other floating cold storages for processing through freezing. The trial court found that the tax applied to all fish obtained by appellants. *Territory of Alaska* v. *The Arctic Maid*, Alaska 1956, 140 F. Supp. 190.

Appellants contend that the trial court erred in so holding for the following reasons: (1) the tax is void because it is part of a taxing system which conflicts with the Constitution and with federal statutes; (2) the tax, because of the territorial limits of Alaskan jurisdiction, does not apply to fish taken on board the freezer-ship when it is more than three miles from shore, even though the fish have been caught within the three-mile distance; and (3) appellants obtained their fish for canning, and therefore the tax does not apply to any of their operations as a matter of statutory interpretation because the statute taxes on the basis of fish obtained for freezing.

The case of one appellant, Northern Reefer Company, involves the additional question of the validity of a lien for the taxes asserted by the Territory against the vessel Reefer II. This appellant was an innocent purchaser of the vessel after it had engaged in the operations for which tax is now claimed. The trial court upheld the lien.

I.

Appellants contend that the tax imposed on freezer ships is void because: (1) it is part of a tax system which discriminates against burdens and interstate commerce in violation of the commerce clause, Article I, § 8 of the Constitution; (2) the separate tax classification of freezer ships and other floating cold storages is arbitrary and unreasonable, and is therefore in conflict with the equal protection clause of the 14th Amendment, the privileges and immunities clauses of Article IV, § 2, and the 14th Amendment, the due process clauses of the 5th and 14th Amendments, and the White Act, 43 Stat. 464 (1924), 48 U.S.C. § 22; and (3) the tax is a modification of the United States fish laws and therefore prohibited to the Alaskan legislature by the Organic Act of Alaska, § 3, 37 Stat. 512 (1912), 48 U.S.C. § 24.

The Alaskan statutes provide for these relevant taxes: A tax on salmon canneries, both shore-based and floating, of 6% of the value of the raw fish purchased or otherwise obtained for canning during the year;[1] and 1% of the value of the raw fish diverted for other purposes;[2] a tax

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[1] Chapter 82, § 1(a), Session Laws of Alaska, 1949, as amended by Chapter 113, § 1, Session Laws of Alaska, 1951, reading as follows:

(a) Salmon canneries, both shore based and floating: An annual license tax equal to 6 percent of the value of the raw fish purchased or otherwise obtained for canning during the year. For the purpose of this license, such raw fish value of each kind of salmon shall be deemed to be a dollar value equal to 50 percent of the average wholesale price obtained for the finished product by principal canned salmon brokers in Seattle, Washington, during the months of August, September, October, November and December, of the license year.

[2] Chapter 82, § 1(a)(1), Session Laws of Alaska, 1949, reading as follows:

(1) Salmon received by salmon canneries and diverted for the purposes other than canning, would be valued at the average prevailing price on the fresh fish market for that fish and would be subject to an annual license tax of 1 percent of the value.

on freezer ships and other floating cold storages of 4% of the value of the raw fish bought or otherwise obtained for processing through freezing;[3] and a tax on shore-based cold storages and all other fish processors, except salmon canneries and others not here relevant, of 1% of the value of the raw fish bought or otherwise obtained for processing through freezing, salting, or other method.[4] Although the value of the raw fish is not determined in the same way under these three statutes, little testimony was offered on this point, and none of it indicated that the relative amounts of tax were significantly affected by this difference. We shall therefore treat the statutory percentages as reflecting the relative impact of the taxes.

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[3] Chapter 97, § 1, Session Laws of Alaska, 1949, as amended by Chapter 116, § 1, Session Laws of Alaska, 1951, reading as follows:

(b) Freezer ships and other floating cold storages: An annual license tax equal to 4% of the value of the raw halibut, halibut livers and viscera, salmon and bottom fish, shellfish or other fishing resources bought or otherwise obtained for processing through freezing. The value of the raw material under this license shall be the actual price paid for same including indirect considerations such as fuel or supplies furnished by the processor or offsets to the cash value for gear furnished, etc. Such value shall apply to the raw material herein mentioned which is procured in company owned or subsidized boats operated by employees of the processor or under lease or other arrangement.

[4] Chapter 97, § 1(a), Session Laws of Alaska, 1949, as amended by Chapter 116, § 1, Session Laws of Alaska, 1951, reading as follows:

(a) Shore based cold storages and all other fish processors, except salmon canneries, herring processing plants, crab canneries and clam canneries otherwise licensed: An annual license tax equal to 1% of the value of the raw halibut, halibut livers and viscera, salmon and bottom fish, shellfish or other fishing resource bought or otherwise obtained for processing through freezing, salting or other method. The value of the raw material under this license shall be the actual price paid for same including indirect considerations such as fuel or supplies furnished by the processor or offsets to the cash value for gear furnished, etc. Such value shall apply to the raw material herein mentioned which is procured in company owned or subsidized boats operated by employees of the processor or under lease or other arrangement.

Appellants claim that the effect of the tax system is to hamper, burden and discourage the interstate movement of salmon prior to final processing. They point to these facts: The shore-based cold storages are taxed at 1% for freezing fish; the Alaskan canneries are taxed 1% for fish which they do not can and are not taxed for freezing fish which they later can; the appellants are taxed 4% for freezing fish. Even assuming that the tax on freezer ships is one affecting interstate commerce and therefore subject to the limitation of the commerce clause,[5] in our view this portion of the Alaskan tax system as applied to appellants does not discriminate against or unduly hamper the interstate movement of salmon prior to final processing. The shore-based cold storages freeze fish for the fresh frozen consumer market; they are not in competition with appellants, who can all their fish. Fish frozen by a cannery but not canned are likewise not in competition with appellants' product. We see no significance in the fact that the Alaskan canneries do not pay a tax at the freezing stage on fish which they later can. This is only an illusory benefit for such fish will be taxed at the 6% rate before they enter the market to compete with appellants' product. The same is true of the fact that the Territory does not collect the 1% freezing tax from shore-based cold storages on fish which are later canned in Alaska, for these fish are likewise subject to the 6% canning tax before they enter the canned salmon market.

Appellants have urged us to consider three cases as principal support for their contention that the freezer ship tax is a burden on commerce: *Foster-Fountain Packing Co.* v. *Haydel*, 1928, 278 U.S. 1; *Toomer* v. *Witsell*, 1948, 334 U.S. 385; and *Memphis Steam Laundry* v. *Stone*, 1952, 342 U.S. 389. None of these cases are in point for in

[5] We do not decide the contested issue of whether the operation of the freezer ships in obtaining and freezing fish in Alaskan waters is in interstate commerce or a purely local operation. Compare *Oliver Iron Co.* v. *Lord*, 1923, 262 U.S. 172.

each case the court found that the statute in question was designed to and actually did operate in a discriminatory manner to discourage use of out-of-state competition and to encourage local industry. No such contention is made here.[6] We conclude that the tax as here applied does not discriminate against or burden interstate commerce so as to violate the commerce clause.

We also reject appellants' next contention that the separate tax classification of freezer ships is arbitrary and unreasonable. Freezer ships are different from the shore-based cold storages in that the former obtain their fish for canning while the latter obtain theirs for the fresh frozen consumer market. The legislature is free to differentiate between different industries, taxing one more heavily than another.[7] Therefore it may tax the canned salmon industry more heavily than the fresh-frozen salmon industry.

It is equally clear that the freezer ships do compete in the same industry as the Alaska canneries. Unlike these competitors, they do not can their fish in Alaska. However, this difference is reflected in the substantially lower tax required of them as contrasted with that paid by the Alaskan canneries. Appellants have contended that certain ships which catch Alaskan salmon and preserve it by icing before carrying it elsewhere for canning, are

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[6] The statutes declared invalid were:

(a). A Louisiana statute prohibiting export of shrimp from the state before the heads and shells had been removed. *Foster-Fountain Packing Co.* v. *Haydel*, supra;

(b) A South Carolina statute requiring fish caught within the state to be unloaded, packed and stamped before being shipped out of the state. *Toomer* v. *Witsell*, supra;

(c) A Mississippi statute imposing a privilege tax on laundries not licensed in the state which solicited business therein. *Memphis Steam Laundry* v. *Stone*, supra.

[7] *Quong Wing* v. *Kirkendall*, 1912, 223 U.S. 59; *Alaska Fish Co.* v. *Smith*, 1921, 255 U.S. 44; cf. *State Board of Tax Commissioners* v. *Jackson*, 1931, 283 U.S. 527.

not taxed at all. We have been unable to find any substantial evidence in the record that such ships are operating, and therefore reject this contention as not sustained by proof.

It is unnecessary to consider the applicability of the many cases bearing on the question whether arbitrary or unreasonable tax classifications violate the Constitution, since it appears that no arbitrary or unreasonable classification is present in this case. *State Board of Tax Commissioners v. Jackson*, 1931, 283 U.S. 527, 537.

This conclusion of fact likewise answers the argument of appellants that the freezer ship tax violates the White Act, 43 Stat. 464 (1924), 48 U.S.C. § 222, by denying them as United States citizens the right to fish in areas where fishing is permitted by the Secretary of the Interior. Appellants do not contend that this Act grants them immunity from taxation by the Territory in the exercise of their fishing rights. Their argument is that the tax is discriminatory and therefore impairs their right to fish on a basis of substantial equality as guaranteed by the White Act. Since we have found that the freezer ship tax as here applied is not unreasonable, arbitrary or discriminatory, we find that appellants are not prevented from exercising their fishing rights on a basis of substantial equality.[8]

Appellants next contend that the freezer ship tax is an attempt to modify the fish laws of the United States in violation of the Organic Act of Alaska, § 3, 37 Stat. 512 (1912), 48 U.S.C. §24. That Act denies to the territorial legislature authority to alter, amend, modify or repeal, among others, the fish laws of the United States applicable to Alaska, except that "[t]his provision shall not operate to prevent the [Alaskan] legislature from imposing other and additional taxes or licenses." Appellants' contention

[8] This is not a case of a revenue act so harsh that it amounts to a prohibition against fishing. Compare *P. E. Harris & Co.* v. *Mullaney*, Alaska 1949, 87 F. Supp. 248.

is without merit. This is not a case in which fish regulation is attempted through the imposition of a prohibitive license tax on an unwanted activity.[9] The imposition by Alaska of reasonable taxes is clearly permitted by Congress.[10] We therefore find this tax to be valid.

II.

Appellants contend that the freezer ship tax is imposed on the operation of freezer ships and not on the act of taking fish. They conclude that they should be taxed only on those fish taken on board the freezer ships while they were actually within Alaskan waters. The trial court found that the taxable event was the taking of the fish from the waters of Alaska. The court therefore directed that the tax be paid on all fish obtained from Alaskan waters. This included fish obtained by company-operated catcher boats while their mother freezer ship was outside such waters as well as fish purchased by the freezer ship outside Alaskan waters from independent catchers. The court reasoned that a contrary rule would permit evasion of Alaskan tax laws by the subterfuge of anchoring freezer ships outside Alaskan waters while those waters were being fished on behalf of the freezer ships by catcher boats.

We agree with the court below that freezer ships outside Alaskan waters which operate catcher boats within such waters must accept tax responsibility for the fish so obtained. Obtaining fish is an integral part of the operation of the freezer ship. The catcher boats operated by the freezer ship itself are but an extension of that ship's operations. If the extension operates within Alaskan waters, the freezer ship itself is operating within such waters and is subject to Alaska's tax jurisdiction.

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[9] Compare *P. E. Harris & Co.* v. *Mullaney*, Alaska 1949, 87 F. Supp. 248.

[10] *Pacific American Fisheries* v. *Alaska*, 1925, 269 U.S. 269, 277; *Alaska Fish Co.* v. *Smith*, 1921, 255 U.S. 44.

However, we cannot agree that the freezer ships must pay Alaskan taxes on fish obtained within Alaskan waters by independent catcher boats but purchased by the freezer ships outside those waters. By this device freezer ship operators may reduce their liability for Alaskan taxes. However, Alaska cannot extend its taxes to nonresidents beyond its territorial jurisdiction in order to prevent such tax avoidance. The Territory is free to impose such taxes as it sees fit, within the limits set by the Constitution and federal legislation. By the same token, the freezer ship operators are free to arrange their operations so that the impact of such taxes upon them is minimized. Remaining outside the Territory is one method by which a nonresident may accomplish this purpose.

As to the catcher boats operated under contractual arrangements with appellants, the record does not reveal sufficient information about the nature of such arrangements to enable us to decide whether they should be regarded as extensions of the freezer ships. This question will be remanded for determination by the trial court.

The territorial limits of Alaska are defined by statute as those of the territory ceded by Russia to the United States by the treaty of March 30, 1867, 15 Stat. 539. Organic Act of Alaska, § 1, 37 Stat. 512, 48 U.S.C. § 21. That treaty placed the western boundary of the territory at a line running from the Bering Straights to the most western Aleutian island, thereby taking in most of the Bering Sea, including Bristol Bay. The United States at one time asserted regulatory power over seal fishing throughout this portion of the Bering Sea. An international dispute resulted, which was submitted to arbitration by the United States and Great Britain.[11] The arbitrators held that United States jurisdiction to regulate sealing in the Bering

[11] Arbitration was agreed upon in a convention between the United States and Great Britain, concluded February 29, 1892, 27 Stat. 947.

Sea did not extend beyond the ordinary limit of territorial waters, the three-mile limit.[12]

Since the United States had agreed in advance to abide by the award of the arbitrators,[13] this decision was held to result in a withdrawal to the ordinary three-mile limit of exclusive United States jurisdiction over waters of the Bering Sea. *La Ninfa*, 9 Cir. 1896, 75 F. 513. Because Bristol Bay is an arm of the Bering Sea, forming the southeast corner thereof, the three-mile limit for United States jurisdiction in the Bering Sea applies to much of Bristol Bay as well.

We do not agree with the Territory's contention that the freezer ship operators are liable for taxes on fish obtained outside the three-mile zone in Bristol Bay because Alaskan jurisdiction extends throughout the Bristol Bay fishing area as defined by the United States Fish and Wildlife Service.

Bristol Bay is a portion of the Bering Sea which lies in the angle formed by the Alaskan Peninsula and the mainland to the north. Cape Newenham can be regarded as its northern headland, but its southern boundary the Alaskan Peninsula, extends out into the Pacific Ocean much further than Cape Newenham and provides no clearly defined southern headland. The Fish and Wildlife Service defines the Bristol Bay area as follows:

> "The Bristol Bay area is hereby defined to include all territorial coastal and tributary waters of Alaska from Cape Newenham to a point on the coast 3 statute miles south of Cape Menshikof." 50 Code Fed. Reg. ¶ 104.1.

The distance between Cape Newenham and a point 3 miles south of Cape Menshikof is approximately 172 miles.

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[12] 27 Am. Law Rev. 703 (1893).

[13] Convention between the Governments of the United States and Her Britannic Majesty, February 29, 1892, 27 Stat. 947, 951.

The shortest distance between Cape Newenham and the Alaskan Peninsula is 165.5 miles and extends to a point 13.5 miles northeast of Cape Seniavin. It has been asserted that Bristol Bay includes the entire area between Cape Newenham and Cape Sarichef, a distance of approximately 290 miles. Bristol Bay is so large and so ill defined by geographical features that it is better described as a corner of the Bering Sea than as a separate body of water.

The Territory contends that Congress and the United States Fish and Wildlife Service have asserted United States jurisdiction beyond the three-mile limit in Bristol Bay. Congress by statute excludes non-United States citizens and non-residents of the "area embracing Bristol Bay and the arms and tributaries thereof" from stake-net and set-net fishing within the area. 43 Stat. 464 (1924) as amended, 48 U.S.C. § 222a. As we have pointed out, the United States Fish and Wildlife Service has a regulation which defines the Bristol Bay fishing area.

The determination of territorial jurisdiction is a political and not a judicial prerogative. Courts are bound to accept assertions of territorial jurisdiction made by Congress or the federal executive, acting within their authority.[14] However, we have carefully considered both the statute and the fishing are designation in the light of the arbitration award in the seal fishing dispute between the United States and Great Britain and the decision of this court in La Ninfa, supra, and are satisfied that neither constitutes an assertion of jurisdiction binding upon us.

What we have said concerning jurisdiction over Bristol Bay beyond the three-mile limit does not apply to Egegik Bay, Kvichak Bay and Nushagak Bay, all of which are regarded as arms and tributaries of Bristol Bay. The

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[14] *In re Cooper*, 1892, 143 U.S. 472, 503; *Jones* v. *United States*, 1890, 137 U.S. 202; *La Ninfa*, 9 Cir. 1896, 75 F. 513.

width of the entrance of Egegik Bay is less than six miles,[15] and although the width of Kvichak Bay and Nushagak Bay exceed ten miles at their entrances,[16] their locations and history place them within Alaskan jurisdiction.

In *Direct United States Cable Co.* v. *Anglo-American Telegraph Co.*, [1877] L.R. 2 App. Cas. 394, the Privy Council in discussing whether a point in Conception Bay, Newfoundland, more than three miles from the shore, was part of the territory of Newfoundland and within the jurisdiction of its legislature, stated:

> "It seems generally agreed that where the configuration and dimensions of the bay are such as to shew that the nation occupying the adjoining coasts also occupies the bay it is part of the territory. . . ."

In considering the weight to be given historical claims, the court stated:

> ". . . the British Government has for a long period exercised dominion over this bay, and that their claim has been acquiesced in by other nations, so as to shew that the bay has been for a long time occupied exclusively by Great Britain, a circumstance which in the tribunals of any country would be very important. And moreover (which in a British tribunal is conclu-

[15] Bays six miles or less at the entrance are automatically included within the territorial limits of a nation by virtue of drawing a three-mile belt from each headland. Eg. *Manchester* v. *Massachusetts*, 1891, 139 U.S. 240, 257.

[16] In case of an indentation up to ten miles wide at the mouth, the lines across the entrance would mark the limits of inland waters and the marginal sea would extend three miles seaward of that line. In the case of an indentation wider than ten miles, the line shall be drawn three miles seaward from a straight line across the bay in the part nearest the entrance at the first point where the width does not exceed ten miles. Jessup, p. 356; A. L. Shalowitz, Legal-Technical Aspects of the Submerged Lands Cases; (Department of Commerce-U. S. Coast and Geodetic Survey 1954) pages 26-27.

> sive) the British Legislature has by Acts of Parliament declared it to be part of the British territory, and part of the country made subject to the Legislature of Newfoundland."

The United States and Alaska have exercised jurisdiction over these three smaller bays, and the claims of jurisdiction have not been challenged by any foreign government. In a geographical sense, they belong to Alaska, since they are part and parcel of it. In considering bays with headlands more than ten miles in width, the courts usually attach great importance to the historical claims and assertions of jurisdiction over a particular bay by the littoral sovereign as well as to whether there is a definite geographical relationship between the bay and such sovereign.[17]

The record before us does not specify the areas in which the fishing was done in Bristol Bay during the red salmon season. The statistics concerning the volume and money value of the catch by vessel relates to fishing north of Dixon Entrance (54° 40′ North Latitude). We have already found that much of this area is not within the jurisdiction

[17] *People* v. *Stralla*, 14 Cal. 2d 617, 96 P. 2d 941 (1939); *Cunard Steamship Co.* v. *Mellon*, 1923, 262 U.S. 100. On the role of the courts in treating the problem of jurisdiction over bays, see Jessup, Law of Territorial Waters and Maritime Jurisdiction p. 355 et seq. (1927), and 1 Hyde, International Law §§ 146 et seq. (1945). Professor Hyde, at Page 473, states:

> "The coast of Alaska is indented by certain bays of broad dimensions which by reason of their relation to the land appear to belong in a geographical sense to the sovereign thereof."

Included among such bays are Bristol Bay inside of a line drawn from Igagik (also spelled Egegik) to Protection Point. He states:

> "They are water areas which, regardless of the distance between headlands, it is believed that the United States may formally claim to be its own without violating any requirement of international law."

The line of which he speaks is immediately adjacent to Nushagak Bay and Egegik Bay, and at most is just a few miles from the entrance of Kvichak Bay.

of Alaska. However, there was testimony that the Arctic Maid was anchored between Egegik and the Nakinek River, and particularly between Middle Bluff and Red Bluff, when it received all or most of its fish from catcher boats operating within the three-mile limit during the Bristol Bay red salmon season. The bays within and adjacent to this area are all within the jurisdiction of Alaska.

In view of the unsatisfactory record before us as to the precise location in Bristol Bay and its tributaries in which the freezer ships operated and the absence of information as to the volume and value of the catches during such periods, these facts must also be determined by the trial court upon the remand of this case.

III.

Appellants contend that the statute, by its own terms, does not apply to their operations. The statute taxes on the basis of the value of the raw fish resource "bought or otherwise obtained for processing through freezing."[18] Appellants assert that although they froze all their fish, this was not the purpose for which the fish were obtained. They were all obtained for processing through canning, and the freezing was merely a temporary measure to preserve the fish until they could be brought to the canneries at Puget Sound.

We agree with the court below that the freezer ship tax applies to appellants. It is apparent from both the preamble[19] and the body of the statute that the legislature intended to tax freezer ships. During the years in question and the time the statute was enacted, the only freezer

[18] Chapter 97, § 1(b), Session Laws of Alaska, 1949, as amended by Chapter 116, § 1, Session Laws of Alaska, 1951. The text of the section is set out in footnote 3 supra.

[19] Chapter 116—An Act Amending Section 1 of Chapter 97, Session Laws of Alaska, 1949 imposing a license tax on freezer ships and other floating cold storages, and declaring an emergency.

ships which operated in Alaskan waters were those which obtained their fish for canning. There can be little doubt that the legislature intended to cover operations like those of the appellants when it enacted the freezer ship tax. While the statute is not a model of clarity, we think it clear and broad enough to accomplish this legislative purpose. We therefore reject appellants' narrow construction which would result in frustrating that purpose.

Appellants assert that the Alaska Department of Taxation has itself accepted their interpretation of the phrase "bought or otherwise obtained for processing through freezing." This claim is based on testimony of a Department of Taxation enforcement officer that shore-based cold storages for freezing fish which are later canned in Alaska are not taxed even though a somewhat similar phrase prescribes the tax liability of shore-based cold storages.[20] The Department does collect the six per cent canning tax on such fish. Such testimony, even if it represented the official views of the Department of Taxation, does not support appellants' interpretation that freezing of salmon which are ultimately canned is not taxable under a statute which taxes fish obtained "for processing through freezing." A more plausible explanation is that the Department has construed the Alaskan statutes to require imposition of only the highest applicable Alaskan processing tax on fish processed by more than one taxable method. In any event, we believe that the freezer ship tax is applicable to the appellants.

IV.

The final question concerns the validity of the lien asserted by the Territory against the freezer ship Reefer II, presently owned by appellant Northern Reefer Company. The lien was claimed for taxes due as a result of the operations of the Reefer II by the Grimes Packing Company, its

[20] Chapter 97, § 1(a), Session Laws of Alaska, 1949, as amended by Chapter 116, § 1, Session Laws of Alaska, 1951. The text of the section is set out at footnote 4 supra.

then owner during 1952. Under the statute, an initial fee of $25.00 is required before a ship is operated during any year, with payment of the total fees owing as a result of the year's operation to be made by January 15th of the following year. The Grimes Packing Company paid neither the initial nor final fees. Subsequent to January 31, 1953, the ship was sold to Northern Reefer Company by the estate of O. L. Grimes, sole proprietor of the Grimes Packing Company, for value and without notice of any lien on the vessel. The Alaska Tax Commissioner was unaware of the death of Grimes and the transfer of the vessel. He, therefore, made no claim against Grimes' estate for the taxes now alleged to be due.

The lien against the Reefer II is claimed under the following provision:

> "Liens. All taxes levied or provided or accruing under the provisions of this Act, and the penalties and interest thereon are hereby declared to be a lien prior, paramount and superior to all other liens, mortgages, hypothecations, conveyances and assignments, upon all the real and personal property of the person, firm or corporation liable therefor, and also upon all the real and personal property used with the permission of the owner thereof in prosecuting the business . . ."[21]

The appellant contends that the lien under this statute does not actually attach to the property until the tax is assessed by the Tax Commissioner, and since the tax was not assessed until after appellant's innocent purchase of the vessel, the asserted lien is invalid.

Appellant failed to raise this contention at the trial stage, and appellee urges that we refuse to consider it now. Since this case must be remanded to the District Court to determine other issues, we remand it also for a determina-

[21] Chapter 82, § 4(h), Session Laws of Alaska, 1949, made applicable by Chapter 97, § 4, Session Laws of Alaska, 1949, as amended by Chapter 116, § 1, Session Laws of Alaska, 1951.

tion of the validity of the lien in the light of appellant's new contention.

Conclusion

We hold the freezer ship tax to be valid as to all fish obtained by appellants' freezer ships within three miles of Alaskan shores and within such other Alaskan waters as are within the jurisdiction of the United States. Bristol Bay, or the greater portion thereof beyond the three-mile zone, is not within the jurisdiction of the United States, but Egegik Bay, Kvichak Bay and Nushagak Bay, which are tributaries of Bristol Bay, are all within the jurisdiction of the United States.

The tax on fish obtained within Alaskan jurisdiction by catcher boats operated by appellants is valid, but no tax may be levied upon fish obtained by freezer ships outside Alaskan jurisdiction from independent fishermen even though the independent fishermen caught the fish in waters within Alaskan jurisdiction.

The record before us as to the periods in which the freezer ships operated within Alaskan jurisdiction and the volume and value of the catches during such periods is insufficient to enable us to determine the amount of taxes which are attributable to such operations. The case is therefore remanded to the District Court to make that determination.

This record is also insufficient on the status of the contract catcher boats. The trial court is directed to determine whether the operators of these catcher boats were independent contractors or employees of appellants.

The judgment is vacated and the case remanded for a redetermination of the tax in accordance with this opinion and for a re-determination of the validity of the tax lien asserted against the Reefer II.

(Endorsed:) Opinion. Filed Mar. 16, 1959.

Paul P. O'Brien, Clerk.

APPENDIX B

Section 1, Chapter 82, SLA 1949:

AN ACT

Imposing license taxes upon salmon canneries and other businesses in Alaska's commercial fisheries; providing license requirements, defining violations, prescribing penalties; repealing paragraphs (a) to (g), inclusive, of subsection 7th of Section 35-1-11, Alaska Compiled Laws Annotated, 1949, and subsections 8th and 9th of the same section; and declaring an emergency.

"Section 1. BUSINESSES IN ALASKA FISHERIES REQUIRING LICENSES: AMOUNTS THEREOF. Any person, firm or corporation prosecuting or attempting to prosecute any of the following lines of business in connection with Alaska's commercial fisheries shall first apply for and obtain, on the conditions hereinafter set forth, a license so to do on the basis of the following license taxes which are hereby levied:

"(a) Salmon canneries, both shore based and floating: An annual license tax equal to 4 percent of the value of the raw fish purchased or otherwise obtained for canning during the year. For the purpose of this license, such raw fish value of each kind of salmon shall be deemed to be a dollar value equal to 50 percent of the average wholesale price obtained for the finished product by principal canned salmon brokers in Seattle, Washington, during the months of August, September, October, November and December, of the license year.

"(1) Salmon received by salmon canneries and diverted for the purposes other than canning, would be valued at the average prevailing price on the fresh fish market for that fish and would be subject to an annual license tax of 1 percent of the value.

"(b) Herring processing plants in the business of canning, curing, salting, freezing or making meal or oil or other processed product including sale of bait herring by either processing plant or bait herring fisherman: An annual license tax equal to 1 percent of the value of the raw herring. The value of the raw material under this license shall be the actual price paid for same including indirect considerations such as fuel or supplies furnished by the processor or offsets to the cash value for gear furnished etc. Such value shall apply to herring caught in company owned or subsidized boats operated by employees of the processor or under lease or other agreement.

"(c) Crab canneries, both shore based and floating: An annual license tax equal to 2 percent of the value of the raw crabs. The raw crab value for the purpose of this license shall be the actual price paid for same either by cash or its equivalent according to the provisions above set forth for herring processing plants.

"(d) Clam canneries: A license tax equal to 2 percent of the value of the raw clams, with value to be determined according to the provisions above set forth for crab canneries will be levied on razor clams.

"(1) Butter clams shall be taxed in the same manner at the rate of 1 percent of the value of raw clams."

APPENDIX C

Section 1, Chapter 97, SLA 1949:

AN ACT

Imposing license taxes upon certain businesses in Alaska's commercial fisheries; providing license requirements, defining violations, prescribing penalties, and declaring an emergency.

"Section 1. BUSINESSES IN ALASKA FISHERIES REQUIRING LICENSES: AMOUNTS THEREOF. Any person, firm or corporation prosecuting or attempting to prosecute any of the following lines of business in connection with Alaska's commercial fisheries shall first apply for and obtain, on the conditions hereinafter set forth, a license so to do on the basis of the following licenses [license] taxes which are hereby levied:

"(a) Cold storage and other fish processors, except salmon canneries, herring processing plants, crab canneries and clam canneries otherwise licensed: An annual license tax equal to 1% of the value of the raw halibut, halibut livers and viscera, salmon and bottom fish, shellfish or other fishing resource bought or otherwise obtained for processing through freezing, salting or other method. The value of the raw material under this license shall be the actual price paid for same including indirect considerations such as fuel or supplies furnished by the processor or offsets to the cash value for gear furnished etc. Such value shall apply to the raw material herein mentioned which is procured in company owned or subsidized boats operated by employees of the processor or under lease or other arrangement."

APPENDIX D

Chapter 113, SLA 1951:

An Act

"To amend Chapter 82, Session Laws of Alaska 1949, relating to a license tax on salmon canneries; and declaring an emergency.

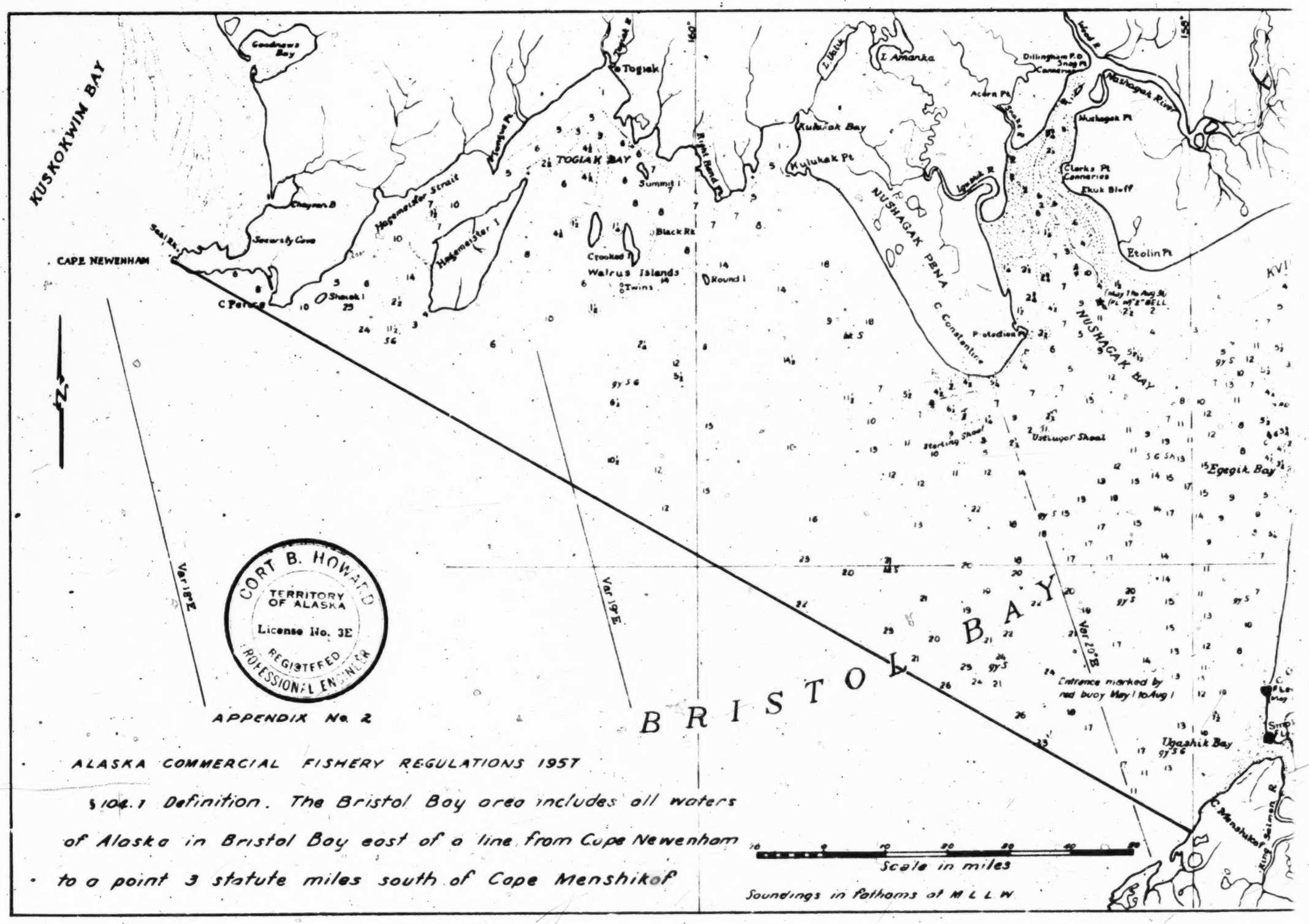
"Be it enacted by the Legislature of the Territory of Alaska:

"Section 1. Subsection (a) of Section 1 of Chapter 82, Session Laws of Alaska 1949, is hereby amended to read as follows:

"(a) Salmon canneries, both shore based and floating: An annual license tax equal to 6 percent of the value of the raw fish purchased or otherwise obtained for canning during the year. For the purpose of this license, such raw fish value of each kind of salmon shall be deemed to be a dollar value equal to 50 percent of the average wholesale price obtained for the finished product by principal canned salmon brokers in Seattle, Washington, during the months of August, September, October, November and December, of the license year."

"Section 2. An emergency is hereby declared to exist and this Act shall take effect immediately upon its passage and approval.

"Approved March 24, 1951."



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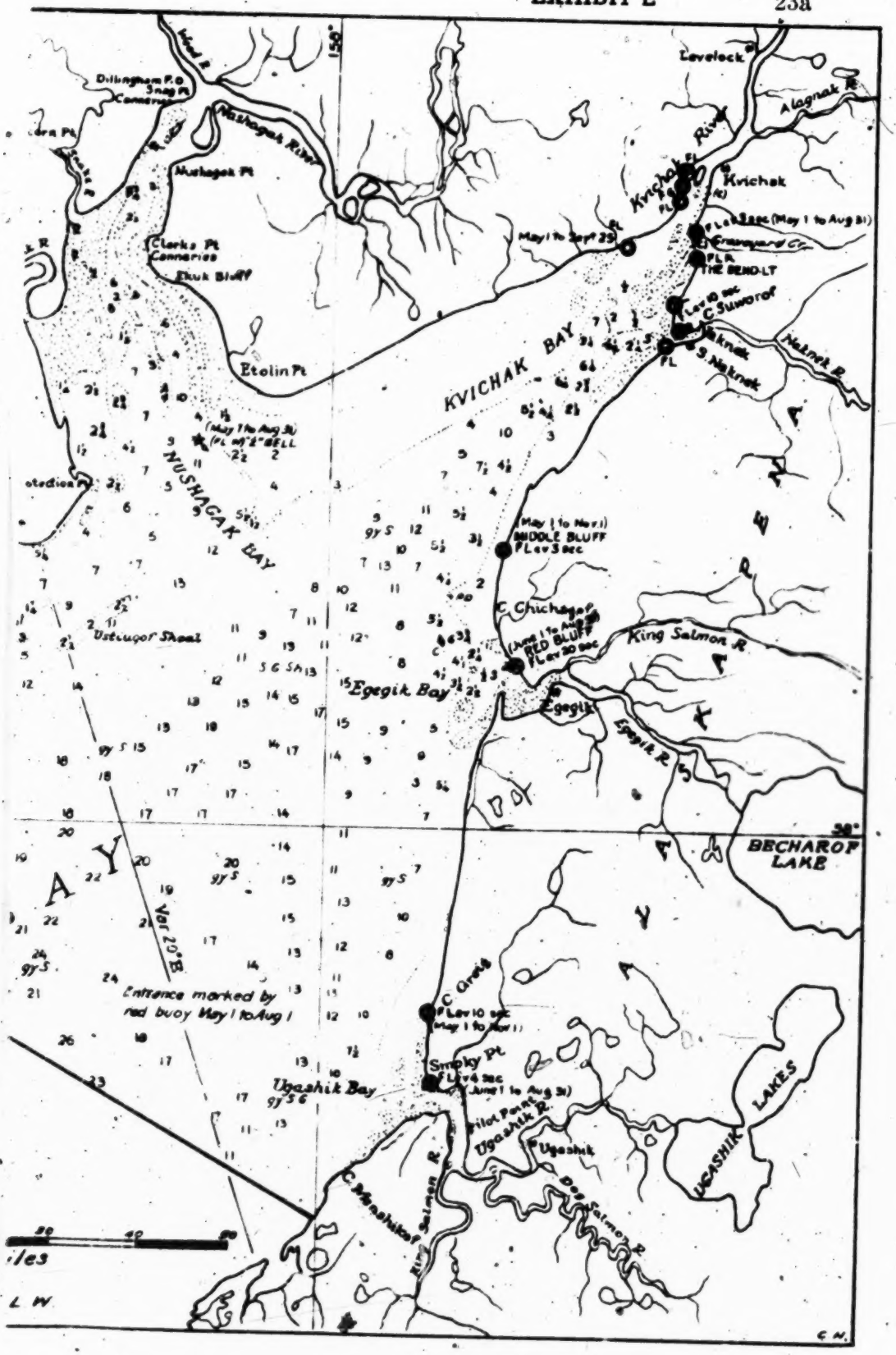
APPENDIX No. 2

ALASKA COMMERCIAL FISHERY REGULATIONS 1957

§ 104.1 Definition. The Bristol Bay area includes all waters of Alaska in Bristol Bay east of a line from Cape Newenham to a point 3 statute miles south of Cape Menshikof


Dillingham P.O
Snag Pt
Wood R
Nushagak River
Nushagak Pt
Clarks Pt
Cannaries
Ekuk Bluff
Etolin Pt
NUSHAGAK BAY
Ustiugof Shoal
Entrance marked by
red buoy May 1 to Aug 1
Var 20°E
Egegik Bay
Egegik
Egegik R
Kvichak
Kvichak River
Alagnak R
Levelock
Kvichak Bay
Naknek
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Naknek R
C Sumnoff
C Chichagof
King Salmon R
BECHAROF LAKE
C Greek
Smoky Pt
Ugashik Bay
Pilot Point
Ugashik R
Ugashik
UGASHIK LAKES
C Menshikof
Big Salmon R
Dog Salmon R
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